IN THE

Supreme Court of the United States

October Term, 1952.

No. 167.

UNITED STATES OF AMERICA,
Appellant,

v.

JOSEPH KAHRIGER,
Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND SUPPORTING BRIEF.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The movant Allan Cohen is a defendant in the United States District Court for the Eastern District of Pennsylvania under a two count criminal information charging the same offenses as those charged against Kahriger.

A motion to dismiss, supported by evidence, was made. The Court reserved decision pending the disposition of the Kahriger case by this Court.

All pending similar cases in the Eastern District of Pennsylvania have been continued pending such disposition.

Special reasons for granting this motion are contained in the accompanying brief.

ARGUMENT.

This brief is confined to two points deemed helpful and substantial but not fully covered in the arguments already before this Court.

I. The Statute Incorporates by Reference Specific Administrative and Penal Provisions of Other Federal Statutes Which Are Themselves Valid Only Because They, Unlike This Wagering Tax Statute, Cover Fields Within the Federal Power to Regulate.

The prosecution in its brief cited certain selected provisions of the wagering tax statute. The appellee cited more provisions. But the attention of the Court was not called to the fact that the provisions of a number of regulatory acts were incorporated by reference. These provisions, which form the administrative and mainly the penal bases of the whole Act, demonstrate plainly its purpose to use the taxing power to regulate intrastate activity which the Tenth Amendment forbids.

The statute, 26 USC 3287, so far as relates to the 10% excise tax provided for in subchapter A, incorporates the provisions, including penalties of the Act, applicable to *pistols and revolvers:* 26 USC 2700-2709. It also, 26 USC 3292, so far as relates to the provisions of subchapter B applicable to the special $50 occupational tax, incorporates additional sections of other regulatory acts, such as 26 USC 3271, applicable to *firearms:* 3273(a) applicable, inter alia, *to brewers,* which itself again incorporates other stamp provisions relating to *distilled spirits, fermented liquors, tobacco and cigars.*

26 USC 2709, which is made applicable to the excise tax, provides:

> "Every person liable to any tax imposed by this subchapter, or for the collection thereof, shall keep such records, render under oath such statements, make

such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

Wilful failure to do any of these things is made a misdemeanor by 26 USC 2707 and it is there provided (applicable alike to the excise tax, 26 USC 3287, as well as the special $50 occupational tax, 26 USC 3294(c)) that in addition to other penalties provided by law that misdemeanor is punishable by the imposition of a fine of not more than $10,000, or imprisonment for one year, or both.

Under 26 USC 3275(a), which is applicable to the special occupational tax, it is provided:

"Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged."

Hence, the prosecution, to sustain this statute, is compelled to ask that it be interpreted and considered like a regulatory statute.

That, however, would violate the well-settled rule that taxing statutes are strictly construed, particularly where they contain penal provisions, whereas regulatory statutes are liberally construed to effectuate the legislative purpose.

Here the prosecution is seeking to invoke two contrary interpretive approaches. In trying to avoid the effect of the *Tenth* Amendment it contends that it is not clear that

the business sought to be taxed is purely intrastate, and, when trying to avoid the effect of the *Fifth* Amendment, the argument is made, with equal earnestness, that it is not clear that the business is *not* purely intrastate.

It is submitted that cases like *Shapiro v. United States*, 335 U. S. 1, are inapplicable here. There, the majority held that the Federal Government had the power to regulate the business under the Price Control Act and therefore anybody in that business was in effect a licensee. Here, not only does the government not contend that the statute in effect licenses gambling but the statute and the regulations themselves insist that no license is granted. (26 USC 3276, Regulation 325.60.)

Shapiro, relying on *Davis v. United States*, 328 U. S. 582, and *Wilson v. United States*, 221 U. S. 361, limited its holding to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation. But no one pretends, least of all the Government, that, contrary to the Tenth Amendment, it has the power to regulate intrastate gambling.

The power to tax is not co-extensive with the power to regulate. Therefore cases justifying the requirement of keeping and producing "public records" because of a licensing or regulatory power are not applicable to this case.

II. This Statute Compels Self-incrimination Under Federal Law Not Merely Because of Possible Prosecution Under the Federal Lottery Law But Under This Very Statute Itself.

Under subchapter B, 26 USC 3290, it is provided that "A special tax of $50 per year shall be paid by each person *who is liable* for tax under subchapter A or *who is engaged* in receiving wagers for or on behalf of any person so liable." (emphasis added)

Thus no one need pay, nor is liable for, the special $50 tax *unless* he has already become liable for the 10% excise tax, either personally or through his principal.

Under 26 USC 3291 provision is made for a registration statement to be filed with the Collector, but this registration statement need not be filed unless the person is already liable for the special tax provided for in Section 3290. And by subchapter C the Collector may demand from time to time any supplemental information the Collector wants for the enforcement of the chapter provisions.

In addition, it is provided in 3294(c) that the penalties of Section 2707, referred to above in connection with the wilful failure to pay the excise tax, are also imposed for the wilful *failure to pay the special occupational tax or to file the required registration statement.*

It seems clear, therefore, that liability to pay the special occupational tax of $50 under Section 3290, or to file the registration statement under 3291, does not arise unless the person *is* either engaged as a principal in the business of accepting wagers or of conducting a wagering pool or lottery, or *is* engaged in receiving wagers for or on behalf of such principal.

Regulation, Section 325.25 provides that:

> "(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor. In the case of a wager on credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor."

Obviously no person "is liable for" the tax *until* he has participated in such a gambling transaction either as principal or agent. Once he has participated and has become liable for the tax, with its consequent duty of keeping daily records (26 USC 3287) and paying the tax, it seems clear that to require him then to pay a special tax which

would be an acknowledgment that he was liable for the excise tax, or to file a registration statement, which would also be an acknowledgment of his liability to pay the excise tax, *for his past conduct*, is to require him to be a witness against himself, since liability to pay the excise tax is at the very least a link in the chain of evidence necessary to be made out to subject him to the penalty for non-payment, or for failure to keep daily records. *Hoffman v. United States*, 341 U. S. 479; *Blau v. United States*, 340 U. S. 159.

Congress, in attempting *under penalty* to compel a person to do an act such as paying a special tax or filing a statement, either of which will constitute the giving of essential evidence to subject one to a penalty for having done or failed to do something else, has attempted an unconstitutional withdrawal of the protection afforded by the Fifth Amendment against self-incrimination.

The problem is not the same as that in an ordinary income tax return. This Court has held, in *United States v. Sullivan*, 274 U. S. 259, that one may not refuse to account for *income* because it was made in crime. But that case did not decide that one had to disclose that the income was in fact made in crime. On its face the income tax return requires a statement of amount and source of income. The source may be either criminal or non-criminal, hence it is for the taxpayer to make his claim of privilege.

In the present case, by reason of the inter-relation of the special tax and the registration statement to the past liability arising out of the excise tax and duty of making daily records, the payment of the special tax or the filing of the registration statement is necessarily evidential as to that liability. If there were no criminal penalty for failure to pay or report as to the excise tax, or if there were no criminal penalty as to the special tax or registration statement, the situation might be different.

The prosecution has suggested, by analogy to the case of *E. Fougera & Co. Inc. v. City of New York*, 224 N. Y. 269, that this statute contains something like a requirement of

a condition precedent to going into business and that it applies not to past conduct but simply to future conduct.[1] But Judge Cardozo was careful to point out in that case that the sale of medicines is a business subject to govern-

1. There is a certain ambiguity about this statute which should be called to the attention of the Court. Under Section 3290, referred to above, it would plainly appear that the duty to pay the special occupational tax does not arise unless he has already engaged in the business or has done an act of gambling. But Section 3294(a) provides as follows:

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

This seems inconsistent on its face, in that it speaks of an act which creates liability for the special tax but fixes a penalty for the failure to pay the tax even before the liability to pay it is created.

Also, Section 3292, which incorporates 26 USC 3271 by reference, provides:

"No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter."

Hence, there seems to be a contradiction between the basic provisions of Section 3290, which create and fix the liability for the special tax, and the provisions of 3294(a) and 3271. This contradiction becomes even clearer upon referring to the regulations.

The regulation in effect between November 1, 1951, the date upon which the Act became effective, until September 1, 1952 reads in applicable part as follows:

"Every person engaged in the business of accepting wagers and liable to the 10% excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24 of these regulations) and every person receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C."

This comports with Section 3290 and the provisions of 26 USC 2701, incorporated by reference, which provided that the returns should be made monthly, and the provisions of Section 2702 that the tax should be paid at the time fixed in Section 2701 for filing return.

But on July 16, 1952, effective September 1, 1952, almost a full year after the conduct sought to be punished by these informations, the regulation was changed. Section 325.50 now provides:

"(a) No person shall engage in the business of accepting wagers subject to the 10 per cent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code."

This regulation therefore presently seems to have created the additional hazard that payment of the excise tax at the end of the first or any succeeding month necessarily incriminates as to a previous failure to register or pay the special occupational tax. Yet any such failure to pay the excise tax is penalized.

ment regulation and because of that it was within the power of a State to impose reasonable conditions on one's right to engage in the business.

Surely that is not true of all conduct, even future conduct. Could Congress validly say, either as a condition precedent or as a condition subsequent, that "Hereafter any person who violates any federal criminal statute must come in and tell us all about it"?

Respectfully submitted,

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